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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 41 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

GUJARAT INDUSTRIAL PRODUCTS

Appearance:

MR MIHIR H.JOSHI FOR MR MANISH R BHATT
for Applicant.
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 16/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

The Income Tax Appellate Tribunal has referred the following two questions at the instance of the revenue, under section 256(1) of the Income Tax Act,1961 (hereinafter referred to as 'the Act'), for the opinion of this Court :

1 "Whether, the Appellate Tribunal is right in law and on facts in deleting the addition on account of unpaid Sales-tax liability amounting to

Rs.3130/- and Rs.895/- invoking the provisions of Section 43B?"

2 "Whether, the Appellate Tribunal is right in law and on facts in deleting the additions made on account of unpaid royalty invoking the provisions of Section 43B amounting to Rs.10,785/- and Rs.4,599/-?"

2 The assessment year is 1984-85 and the relevant accounting period is year ended 30/6/1983. The assessee registered partnership firm carries on business of manufacture of chowk powder and trading and selling followed mercantile assessment of accounting. It appears that there were two sales tax accounts and the credit balance therefrom were taken to balancesheet. Similarly there were two royalty accounts in which there was credit balance which was taken to the balancesheet. The ITO invoked provisions of Section 43B of the Act and disallowed the sum of Rs.3120/- and Rs.895/- being outstanding sales tax liability and Rs.10,785/- and Rs.4,599/- on account of unpaid royalty. The Dy.CIT (Appeals) deleted the addition, revenue carried the matter before the Tribunal. The Tribunal for the reasons stated in its order upheld the order of Dy.CIT (Appeals) and hence, this reference.

3 We have heard Mr.M.H.Joshi, learned Counsel appearing for the revenue. Though served, none appears on behalf of the respondent-assessee.

4 Mr.Joshi fairly points out that first question referred to us stands concluded by a decision of the Apex Court in the case of Allied Motors (P) Ltd. vs. CIT, 224 ITR 677. Following the said decision, we hold that the Tribunal was right in law in deleting the addition on account of unpaid sales tax liability amounting to Rs.3,130/- and Rs.895/- by holding that provision of Section 43B of the Act was not applicable.

5 In so far as unpaid royalty is concerned, it was submitted on behalf of Mr.Joshi that Section 43B opens with non-obstant clause and hence any deduction which was otherwise allowable under the Act could not be allowed unless and until amount had actually been paid by the assessee. It was further submitted that even if the assessee was following the mercantile system of accounting it could not be permitted deduction on the basis of accrual of liability in view of the said section.

6 We have no quarrel with the aforesaid proposition canvassed by Mr.Joshi. However, provisions of Section 43B as they stood for the relevant assessment year read as under :

Certain deductions to be only on actual payment.

43B "Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-

(a) any sum payable by the assessee by way of tax or duty under any law for the time being in force, or"

The said provision was amended by substituting clause (a) by Finance Act,1988 with effect from 1/4/1989. The substituted clause (a) reads as under :

"[(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or]"

Therefore, words "cess" or "fee" were not available nor was the phrase "by whatever name called" available for the purpose of invoking in case of outstanding royalty which was paid in the subsequent year. The word royalty does not fall within the meaning of "tax" or "duty".

7 Normally, the concept of royalty signifies a recurring payment made to the State for the extraction of minerals from land i.e. something paid as a price for mineral rights. Royalty on mineral rights is not a tax on land but a payment for the user of land.

8 Therefore, we find no infirmity in the reasoning of the Tribunal when it applied the provisions as were applicable to the assessment year under consideration viz., that as words "cess" or "fee" had been added with effect from 1/4/1989 no disallowance in respect of the royalty amount could be made by resorting to provision of Section 43B of the Act.

9 Moreover, the Tribunal has also taken note of the fact that the Deputy C.I.T.(Appeals) has recorded that both sales-tax and royalty liabilities became due in last quarter of the financial year and were payable and

actually paid in the next accounting year before the due date of the return.

10 Both the questions therefore referred to us are answered in the affirmative i.e. in favour of the assessee and against the revenue.

11 The reference stands disposed of accordingly with no order as to costs.

Sd/- Sd/-

(M.S.Shah,J) (D.A.Mehta,J)

m.m.bhatt